85-1521

No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROYAL E. SMITH,

Petitioner,

v.

THE OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether Congress intended to permit recovery of damages beyond lost wages in Age Discrimination in Employment Act (ADEA) cases.

PARTIES

Royal E. Smith

The Office of Personnel Management, United States of America

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ROYAL E. SMITH,

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v.

THE OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Royal E. Smith petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion, Judgment and Findings of Fact and Conclusion of Law by the Fifth Circuit Court of Appeals concerning this case was reported at 778 F.2d 258 (5th Cir. 1985). See Appendix A at 1a. The Judgment and Findings of Fact and Conclusions of Law by the District Court as affirmed by the Fifth Circuit Court of Appeals was reported at ____F.Supp.____ (N.D. Tex. 1985). See Appendix B at 1b.

JURISDICTIONAL STATEMENT

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 13, 1985, affirming the original action of the District Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner is a licensed psychologist who worked for the United States Civil Service Commission, now The Office of Personnel Management, from December, 1972, until the Fall of 1976 as a Personnel Research Psychologist. On February 1, 1983, after having exhausted administrative remedies through the United States Civil Service Commission and The Office of Personnel Management, Petitioner filed his Original Complaint. On May 31, 1984, the parties entered into an Agreement and Stipulation "...that the only remaining issues in the case are the damages and attorney's fees issues." The District Court, in accordance with the stipulation, entered a Partial Judgment on June 14, 1984, deciding "...that Defendant is liable to Plaintiff in an amount to be determined by the Court at a later date."

A Pre-Trial Order as to damages was entered by the District Court on November 26, 1984, and on the same date the District Court heard evidence as to the damage aspects of the litigation. On December 5, 1984, the Court in open court dictated its Findings of Fact and Conclusions of Law awarding Judgment to the Appellant. On January 16, 1985, the District Court in open court issued its ruling on the attorney's fees and costs to be awarded.

Petitioner appealed the District Court's Judgment to the Fifth Circuit Court of Appeals who entered its Opinion on December

13, 1985, *Smith v. Office of Personnel Management*, 778 F.2d 258 (5th Cir. 1985).

REASONS FOR GRANTING THE WRIT

As the Fifth Circuit Court of Appeals observed this case presents a fact stipulation not previously encountered in ADEA cases. This case differs because Petitioner presents a loss for tangible, easily measurable damages rather than intangible damages such as pain and suffering.

It is Petitioner's contention that the Fifth Circuit's conclusion that a government employee's damages are limited to lost wages is contrary to the purposes and intent of the ADEA.

It is clear that under Sec. 15(c), language which is comparable to that contained in Sec. 7(b) and identical to that in Sec. 7(c), an enforcement and remedial scheme that is independent of the rest of the ADEA is established. In other words, the remedial scheme for federal employees is not exactly the same as non-federal employees and remedies in the non-federal employment context cannot automatically be applied to federal employment cases. However, there is little question, from both judicial decisions and EEOC regulaltions, that back pay is available. *DeFries v. Harrhues*, 488 F. Supp. 1037 (ND Ill 1980); *Jones v. Cleland*, 466 F. Supp. 34 (ND Ala 1978).

Generally, in the exercise of its discretion a court may order the promotion of a prevailing employee. The promotion is to be retroactive and the employee still may, but need not be, considered for promotion if he is qualified for the promotion. Likewise, a trial court may, but need not, order reinstatement of wrongfully discharged employees. In the instant case, however, it is not possible to promote or reinstate the Petitioner due to the discriminatory actions of the Respondent.

The award of lost benefits, either in a lump sum payment or in the form of the restoraiton of the benefit itself, is a standard element of relief awarded to plaintiffs in non-federal employment cases. In federal employment cases, federal employees have been made awards of lost benefits. *Moysey v. Andrus*, 481 F. Supp. 850 (DDC 1980); *Jones v. Cleland*, 466 F. Supp 34 (ND Ala. 1978).

THE LEGAL STANDARDS

It is clear that Congress added Sec. 15 to the ADEA to address the problems of age discrimination in federal employment. *Lehman v. Nakshian*, 101 S.Ct. 2698; 453 U.S. 156, 69 L.Ed.2d 548 (1981).

In *Lehman v. Nakshian, supra*, at 101 S.Ct., p. 2702, the Court stated:

> Section 15 of the ADEA, 29 U.S.C. Sec. 633a (1976 ed, and Supp. III), prohibits age discrimination in federal employment. Section 15(c) provides the means for judicial enforcement of this guarantee: any person aggrieved "may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes" of the Act.

In *Lehman v. Nakshian, supra*, this Court clearly pointed out that the statutory scheme adopted by Congress as applicable to the Federal Sector was based on Title VII and not the Fair Labor Standards Act. In this regard, Section 15(a) and Section 15(b) of the ADEA are patterned directly after Section 717(a) and 717(b) of Title VII. The Court stated:

> Moreover, another basis of the decision in *Lorillard* was that when Congress chose to incorporate the enforcement scheme of the Fair Labor Standards Act (FLSA)

into Sec. 7 of the ADEA, it adopted in ADEA the FLSA practice of making jury trials available. 434 U.S., at 580-583, 98 S.Ct. at 869-871. Again, that reasoning has no relevance to this case, because Congress did not incorporate the FLSA enforcement scheme into Sec. 15. See 29 U.S.C. Sec. 633a(f) (1976 ed., Supp. III). Rather, Secs. 15(a) and (b) are patterned after Secs. 717(a) and (b) of the Civil Rights act of 1964, as amended in March 1972, see Pub.L. 92-261, 86 Stat. 111-112, which extend the protection of Title VII to federal employees. 42 U.S.C. Secs. 2000e-16(a) and (b). See 118 Cong. Rec. 24397 (1972) (remarks of Sen. Bentsen, principal sponsor of Sec. 15 of ADEA.) *Lehman v. Nakshian,* 101 S.Ct. at 2703.

Despite the importnt similarities between Title VII and the ADEA, "it is the remedial and procedural provisions of the two laws that are crucial and there we find significant differences." *Lorillard v. Pons,* 434 U.S., at 584; 98 S.Ct. at 872. Specifically, Congress provided for both "legal or equitable relief" in the ADEA, but did not authorize "legal" relief in so many words under Title VII.

In *Lehman v. Nakshian, supra,* 101 S.Ct. at 2704, the Court explained:

> Congress expanded the scope of ADEA in 1974 to include state and local governments and Federal Government employers. State and local governments were added as potential defendants by a simple expansion of the term "employer" in the ADEA. The existing substantive and procedural provisions of the Act, including Sec. 7(c), were thereby extended to cover state and local government employees. In contrast, Congress added an entirely new section, Sec. 15, to address the problems of age discrimination in federal employment. Here Congress deliberately

> prescribed a distinct statutory scheme applicable only to the federal sector, and one based not on the FLSA but, as already indicated, on Title VII, where, unlike the FLSA, there was no right to trial by jury.

The Congressional intent is seen in the Congressional Record Senate, July 19, 1972, 118 Cong. Rec. 24397, where the sponsor of the bill, Senator Bentsen, remarked:

> Mr. President, I agree with President Nixon that it is time to make the Age Discrimination in Employment Act more comprehensive in its coverage. The committee bill, which incorporates my amendment, would bring Federal employees under the coverage of a law specifically directed at the overall problem and give some focus to other remedies which simply have not done the job.

THE "MAKE WHOLE" STANDARD

The legal standard to be utilized in compensating the victim of discrimination because of the actions of an employer under the ADEA is that the victim is to be "made whole". This compensation concept is similar to the Title VII compensation concept and has been generally adopted as a means of compensating victims of discrimination under the ADEA. *Cancellier v. Federated Dept. Stores*, 672 F.2d 1312 (9th Cir. 1982).

The "make whole" concept has its origin in *Johnson v. Goodyear Tire and Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974), when the Court observed:

> It is obvious to us that where employment discrimination has been clearly demonstrated, employees who have been victims of that discrimination must be compensated if financial loss can be established.

In addition, the Court recognized that Title VII (and subsequently ADEA remedial relief) looks to the consequences of an employer's acts. Furthermore, the Court warned employers of the private sector, and such warning is now applicable to the government sector, including the United States government, that the remedial provisions of the Civil Rights Acts were to be enforced, when the Court stated:

> Title VII is strong medicine and we refuse to vitiate its potency by glossing it with judicial limitations unwarranted by the stronger medial spirit of the act.

The following year, this Court, in *Albermarle Paper Company v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), gave the rationale for the "make whole" concept, when it held, at 95 S.Ct. 2362, the following:

> It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the Courts with full equitable powers. For it is the historic purpose of equity to "secur[e] complete justice," *Brown v. Swann*, 10 Pet. 497, 503, 9 L.Ed. 508 (1836); see also *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-398, 66 S.Ct. 1086, 1088-1089, 90 L.Ed. 1332 (1946). "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939 (1946). Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination. The terms "complete justice" and "necessary relief" have acquired a clear meaning in such circumstances. Where racial discrimination is concerned,

"the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965). And where a legal injury is of an economic character,

> "[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Wicker v. Hoppock*, 6 Wall. 94, 99, 18 L.Ed. 752 (1867).

The Respondent in the instant case acknowledges that this is the standard to be utilized in computing the damages suffered by the Petitioner when it, in its Final Agency Decision of September 16, 1977 (Plaintiff Exhibit 22, Pg. 10), stated that, under the remedies to be afforded the Petitioner was *"to make Dr. Smith whole* in terms of restoration of rank and *other benefits which he may have lost* as a result of actions improperly taken against him, including the reimbursement of attorney's fees." (Emphasis added.)

The "make whole" concept sounds in tort, as utilized under the ADEA and Title VII, when the decisions of *Johnson v. Goodyear Tire and Rubber Co., supra,* and *Albermarle Paper Co. v. Mooday, supra,* are considered in their entirety. In *Cancellier v. Federated Department Stores, supra,* a practical application of the "make whole" concept is apparent.

This "make whole" concept is important to recognize because in order to figure compensable damages for a victim of discrimination, the "make whole" damages should be construed

under *Pfeifer* and *Culver II*. *Jones and Laughlin Steel Corp. v. Pfeifer*, 103 S.Ct. 2541 (1983); *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1983).

In *Culver II*, the Fifth Circuit defined the problem succinctly when it stated:

> "...[T]he problem is one of fairness to Plaintiffs as well as Defendants in the trial process." *Culver v. Slater Boat Co.*, 688 F.2d (5th Cir. *en banc* 1982) at 286.

It is upon *Pfeifer* and *Culver II* that Dr. Floyd Durham, Ph.D., prepared his report, (Plaintiff Exhibit No. 1) which concluded the after tax — before date of estimate loss at $247,983.00.

In addition to the income from the government the Petitioner would be unable to earn $11,440.00 as a consultant. In Table II (Plaintiff Exhibit 1, P. 3) Dr. Durham calculated the loss after overhead expense and tax payments for the period of time that the Petitioner could have earned consulting fees to be $61,799.00. In conclusion, Dr. Durham, utilizing the procedures recognized by this Court under *Pfeifer* concluded that the before trial loss of earning capacity after tax to be a total of $309,782.00. Dr. Durham in his analysis of the after trial loss utilized the less-than-market discount method called for by *Culver II* and also prepared the value of the lost pension benefits. In summary, Dr. Durham summarized the losses of the Petitioner as follows:

Before trial loss (after tax)	
Government Service	$247,983.00
Consulting Psychologist	61,799.00
After trial loss at present value	297,111.00
Consulting Psychologist	56,015.00
Pension Benefits	309,584.00
Total Loss	$972,472.00

The estimates were based on the following conditions:

(1) The Petitioner's inability to become productive after his 1976 discrimination due to age, and

(2) The Petitioner's complete loss of job, practice, pension and retirement benefits.

The medical evidence admitted at the liability hearing is contained in Plaintiff's Exhibits Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, and they clearly demonstrate that as a result of the discriminatory acts that the Petitioner was totally incapacitated to perform his job funciton and will not be in a position to work in the future. This medical testimony was uncontradicted by the Respondent.

THE BACK PAY ACT

The Respondent relied upon the Back Pay Act as being the statute that expressly controls back pay for federal employees. The Back Pay Act is not the standard to be utilized in ADEA cases. *Cancellier v. Federated Dept. Stores*, 672 F.2d 1312 (9th Cir. 1982); *Naton v. Bank of Cal.*, 649 F.2d 691 (9th Cir. 1981); *Wehr v. Burroughs Corp.*, 619 F.2d 276 (3rd Cir. 1980); *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730 (5th Cir. 1977).

The judicial relief envisioned under ADEA is set out in 29 U.S.C. 633a(c) when the Act specifies that "any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." The reason that the Back Pay Act is not utilized in ADEA cases is because the Back Pay Act envisions that the employee is to return to work after some valid reason for being away from work when the employee is ready, willing and able to return to work and

the Government has requestd him to return to work. In the instant case, the Back Pay Act does not apply because the legal standard under the ADEA is to be "made whole". Furthermore, in the instant case, the Petitioner cannot be promoted or reinstated, not because of his own volition, but because of the acitons of the Respondent which were violative of the ADEA. Plaintiff's Exhibits Nos. 2, through 18, the medical testimony in this case, in conjunction with the profferred testimony of Dr. William Skinner, clearly demonstrate that the Petitioner's problems are job related and that the Petitioner cannot perform his functions because of the discriminatory acts of the Respondent and that he had passed a government physical in 1974 and had not been found to have hypertension or any of the emotional problems which he now exhibits. Therefore, the Petitioner cannot be reinstated or promoted because of his physical and mental condition. Dr. William Skinner's profferred testimony indicates that there is no reasonable medical probability that the Petitioner will ever be able, for the balance of his life, to function as a psychologist in the job he held at the time of the discriminatory actions.

Petitioner concedes that reinstatement is not mandatory. Reinstatement is within the discretion of the trial court. *Cancellier v. Federated Dept. Stores, supra.* However, the trial court in utilizing its discretion is to give careful consideration of the particular facts of each case before a decision of reinstatement is made. For example, in *Cancellier v. Federated Dept. Stores, supra,* the trial court did not reinstate the victims because he found evidence of acrimony in the record and because the trial court was "fully satisfied that [the verdict] has made the Plaintiffs whole." *Cancellier v. Federated Dept. Stores,* 672 F.2d 1312, at 1319 (9th Cir. 1982).

DAMAGES IN LIEU OF REINSTATEMENT

Ordinarilly a verdict for the Plaintiff on the age discrimination claim is *res judicata* on Plaintiff's equitable reinstatement claim. However, in a case such as this one, where the Petitioner cannot be reinstated because of no fault of his own, damages may be awarded in lieu of reinstatement. These damages are in addition to any other form of damages. Generally however, the value of reinstatement is often speculative because there are many variables in an employee returning to the work force for the same employer. A possible exception would be cases involving the breach of employment contracts of a specified duration, as recognized by *Cancellier v. Federated Dept. Stores, supra*. It is Petitioner's contention that in this situation since the Petitioner will never be able to be reinstated he has a limited time span, that is, his work life expectancy, so that damages in lieu of reinstatement are able to be calculated with some certainty, as Dr. Floyd Durham has done in his report, utilizing the normal statistical date of retirement, May 19, 1992.

In *Blim v. Western Electric Co., Inc.*, 731 F.2d 1473 (10th Cir. 1984), the court recognized that reinstatement is the preferred remedy under the ADEA. In fact, the focus of the Congressional statement of purpose is on the continuing employment of older workers. *See:* 29 U.S.C., Sec. 621, Clearly, reinstatement best serves Congress's purpose in enacting the ADEA. The Tenth Circuit therefore held that courts should order reinstatement under the ADEA whenever it is an appropriate remedy. Unfortunately, in the instant case, reinstatement or promotion are not appropriate remedies because of the devastating nature of the discriminatory actions of the Respondent and their physical and mental effect upon the Petitioner. The causation of the Petitoner's inability to be reinstated is clearly set forth in Plaintiff's Exhibits 2 through

18 and Dr. William Skinner's profferred testimony, as well as the testimony of the Petitioner.

Consequently, it is Petitioner's position that the normal statistical date of retirement, that is, May 19, 1992, is the appropriate cut-off date for back wages. *See:* Plaintiff's Exhibit 1, Pg. 1.

THE COLLATERAL SOURCE RULE

The trial court utilized the temporary benefits being paid to the Petitioner as an off-set and, in so doing, denied the Petitioner any monies for back-pay, front-pay or other damages. In effect, the trial court utilized the collateral source rule in offsetting the Petitioner's damages. The Fifth Circuit Court of Appeals affirmed this holding.

The collateral source rule, a rule rooted in common law, can be defined as a rule that provides that an injured party may recover full damages from a wrongdoer regardless of payment for his injuries received from sources wholly independent of the wrongdoer.

To permit recovery and thus allow a plaintiff to recover twice for the same element of damages would compensate the plaintiff in excess of his loss. On the other hand, to deny recovery to the extent of the payment or other payment not attributable to the wrongdoer bestows upon the wrongdoer a benefit the wrongdoer has done nothing to deserve.

The collateral source rule should be applied to the temporary compensation benefits the Petitioner is receiving and the Respondent should not get credit for these funds for the following reasons:

(1) The Petitioner's last work day was October 21, 1976,

the day he ceased receving compensation from the U.S. Civil Service Commission. (Defendant Exhibit 21). From October 21, 1976 through 1977 and 1978, the Petitioner utilized sick leave and annual leave and ultimately bought back under the provisions his leave utilized so that the compensation he received was retroactively effective to October 22, 1976.

On December 22, 1976, the Petitioner filed his complaint of discrimination. Therefore, the last day of work and the receipt of the benefits under the temporary disability compensation that the Petitioner is receiving accrued prior to the final determination of discrimination by the Respondent as evidenced by Respondent's Final Decision on September 16, 1977. (Plaintiff Exhibit 22). Therefore, the compensation that the Petitioner has been receiving was not treated as a direct offset by the Respondent at the time it was determined that the Petitioner was entitled to the temporary disability compensation, and it should not be so treated.

In fact, the determination that the Petitioner was entitled to temporary disability compensation was decided prior to and applied retroactively to October 22, 1976, two months prior to the time that the Petitioner initiatd his claim of discrimination and eleven months prior to the time that Respondent Agency determined that the Petitioner's discriminatory claim was valid.

(2) The temporary disability compensation the Petitioner is presently receiving is for the physical and mental damage the Respondent did to the Petitioner.

The temporary disability compensation is not provided for as a measure of damages under the ADEA since the legal standard for the measure of damages under the ADEA is to have the victim to be "made whole". The temporary disability compensation is provided under a separate act and is administered by a different agency. It is clear through the medical

reports, Plaintiff's Exhibits 2 through 18, and Dr. William Skinner's profferred testimony, that the Petitioner suffered the physical and mental harm he presently exhibits as a result of the discriminatory actions of the Respondent. However, the Petitioner would be entitled to the temporary disability compensation whether or not the Respondent or this Court determined that the Petitioner's discriminatory claim was valid.

(3) The U.S. Civil Service Commission (USCSC), now the Office of Personnel Management (OPM), the agency for which the Petitioner was directly employed, has nothing to do with the allowance or disallowance of the temporary compensation benefits.

Although it is the same overall wrongdoer, the *Dual Capacity Doctrine* applies in that the Office of Workers' Compensation Payments (OWCP) agency does not control the OPM agency. It is, apparently, the practice of the government to attribute back through a budgetary entry OWCP payments made to the Petitioner to the OPM, but these budgetary entries are made as the result of the determination that the Petitioner is entitled to temporary total disability compensation as determined by the compensation agency and not the Office of Personnel Management (OPM).

(4) Petitioner has been unable to find legal authority to demonstrate that the collateral source rule should be applied under the facts of the instant case to this particular type of payment. However, the Petitioner directs the Court to similar fact situations for guidance.

SOCIAL SECURITY

The collateral source rule generally permits an injured person to recover full damages without regard to benefits paid by

Social Security and its subsidiary Medicare and Medicaid programs. The Federal Old Age Survivors and Disability Insurance Benefits Act, 42 U.S.C. Sec. 401-431, covers the Social Security aspects of an employee's work.

In *Smith v. United States*, 587 F.2d 1013 (3rd Cir. 1978), deductions of a wife's social security survivor benefits from recovery was error. The collateral source rule was applied and the offsets were denied.

In *A. H. Bull Steamship Co. v. Lignon*, 285 F.2d 936 (5th Cir. 1960), the Fifth Circuit rule applied and evidence of payment of pension benefits to a disabled employee by his employer was excluded because the benefits were derived from Social Security.

UNEMPLOYMENT COMPENSATION

Although unemployment compensation is not exactly the same as the benefits being paid the Petitioner in this case, that is, one draws unemployment compensation because one is ready, willing and able to work but cannot find work; whereas, in the instant case, the Petitioner draws temporary disability compensation because he is physically and mentally not able to work, not by his own volition, but because of the discriminatory acts of the Respondent.

Unemployment compensation is subject to the collateral source rule.

In *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525 (9th Cir. 1962), the collateral source rule applied in a Jones Act case to payment from the California Unemployment Disability Fund.

In *Gypsum Carrier, Inc., supra*, the court stated:

> The question is not whether a windfall is to be conferred, but rather who shall receive the benefit of a windfall which already exists. As between the injured person and the tortfeasor, the former's claim is the better. This may permit a double recovery, but it does not impose a double burden. The tortfeasor bears only the single burden for his wrong. That burden is imposed by society, not only to make the plaintiff whole, but also to deter negligence and encourage due care.

In *Southern v. Plumb Tools, A Div. of O'Ames Corp.*, 696 F.2d 1321 (11th Cir. 1983), the court correctly applied the collateral source rule, at 1323:

> Under the "collateral source rule," compensation for injuries from a source wholly independent of the tortfeasor is not deducted from the damages recovered against the tortfeasor. 22 Am.Jur.2d *Damages* Sec. 206 (1965). For a discussion of the collateral source doctrine as applied to workmen's compensation benefits, see *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525, 533-37 (9th Cir. 1962); *Annot. Collateral Source Rule: Injured Person's Receipt of Recovery against Tortfeasor*, 4 A.L.R.3d 535 (1965); 22 Am.Jur.2d *Damages* Sec. 207 (1965).
>
> *Eichel v. New York Central Railroad*, 375 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307 (1963) (prejudicial to plaintiff in suit brought under Federal Employer's Liability Act to admit evidence he received disability payments under Railroad Retirement Act); *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 84 S.Ct. 1, 11 L.Ed.2d 4 (1963) (reversible error to admit evidence of benefits paid under Longshoremen's and Harbor Worker's Compensation Act in suit brought under Jones Act).
>
> We can identify no strong federal interest requiring us

> to uphold a procedural ruling that severely undermines Alabama's substantive law, *see Byrd v. Blue Ridge Electrical Cooperative, Inc.*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958), particularly since federal courts also have vigorously applied the collateral source rule to prohibit evidence regarding payment of workmen's compensation benefits. *Eichel v. New York Central Railroad* and *Tipton v. Socony Mobil Oil Co., supra; American Fidelity & Casualty Co. v. Drexler*, 220 F.2d 930 (5th Cir. 1955); *Altenbaumer v. Lion Oil Co.*, 186 F.2d 35 (5th Cir. 1950), *cert. denied*, 341 U.S. 914, 71 S.Ct. 734, 95 L.Ed. 1350 (1951). The former Fifth Circuit has noted that "nothing in the Federal Rules of Evidence authorizes departure from the [collateral source] rule." *Borque v. Diamond M. Drilling Co.*, 623 F.2d 351 n. 1 (5th Cir. 1980) (quoting *Riddle v. Exxon Transportation Co.*, 563 F.2d 1103, 1107 (4th Cir. 1977)).

It is Petitioner's contention that Petitioner's situation is similar to *Gypsum Carrier, Inc., supra,* in that Congress in enacting the ADEA wanted to deter employment discrimination based on age. To allow the Respondent to receive the offset of the temporary disability compensation will not fulfill the purposes of the Act and will not deter future employment discrimination.

In *Cancellier v. Federated Dept. Stores*, 672 F.2d 1312 (9th Cir. 1982) at 1320, the issue of deterrance was addressed when the court stated:

> Like the reinstatement remedy, injunctive relief is available under the ADEA when appropriate. The trial judge found that the $2.3 million judgment against I. Magnin, including attorney's fees, was sufficient to discourage I. Magnin from practicing age discrimination in the future. This finding was not an abuse of discretion.

(5) The uncertainty as to the actual future receipt by the Petitioner of the temporary disability compensation favors application of the collateral source rule to this case, especially since the providing of the benefits depends upon a succession of administrative decisions over a long period of time.

It is clear that the temporary disability compensation the Petitioner is receiving is just that, temporary.

The Petitioner must submit himself on an annual basis to medical examinations by physicians of the Federal Office of Workers' Compensation Program's (OWCP) choice. The OWCP alone makes the determination as to whether or not the Petitioner continues to receive temporary disability compensation. In fact, the Petitioner may not litigate an adverse decision that his disability payments be eliminated. In such a situation, this uncertainty favor the application of the collateral source rule.

In *Stanley v. State*, 196 NW 2d 599 (Iowa, 1972), the court stated:

> We have not overlooked the statement of the State (Defendant) at trial that future prosthetic expense should be disallowed because the State would furnish these without cost. The trial court found this to be an uncertain and unsatisfactory arrangement, subject to numerous administrative decisions over the intervening years, and entered judgment for the estimated costs of the services instead. We believe this was the proper course.

INTERIM EARNINGS

Income actually earned by a prevailing plaintiff between the period following the discriminatory act and settlement of damages is regularly deducted from the back pay award.

As relates to Petitioner's income, and in this connection, the Petitioner calls the Court's attention to Defendant's Exhibit Nos. 31, 32 and 37, with particular attention to Defendant's Exhibit 37, which is entitled, "Plaintiff's Net Taxable Income As Shown By His Tax Returns."

Petitioner points out to the Court that these exhibits are not relevant to the setoff or to the Petitioner's taxable income because by law the Petitioner is prohibited from receiving compensation from employment of any nature while he is receiving temporary total disability compensation.

In fact, the taxable income referred to and utilized by the Respondent in these exhibits are not relevant because the Petitioner merely had a community property interest in his wife's corporation for part of the income. Specifically, Defendant's Exhibit 37 includes income produced by others than the Petitioner. The Petitioner has been unemployed and has received no compensable work related income since October 21, 1976. The 1040's utilized in Defendant's Exhibit 37 include the Petitioner's wife's income which should not be included in this case for any purposes. In addition, for example, in 1976, the Petitioner worked until October 21, 1976, at which time he reverted to sick leave and subsequently to annual leave for income.

In 1976 and through April, 1977, the Petitioner utilized sick and annual leave for purposes of being compendated. Also, in 1977, the Appellant had interest income of $6,978.00, dividend income of $735.00, capital gains attributable income of $3,750.00 and rental income of $718.00. None of this income was attributable to Petitioner's employment and, clearly, the collateral source rule prohibits this income from being used as an offset. In 1977, the $2,270.00 income from the consulting corporation is all attributable to the Petitioner's

wife and other corporate owners. The Petitioner was not an employee or officer of the ADLS Corporation. The Petitioner's interest comes from his community property interest by virtue of being married to his wife. Clearly, the collateral source rule prohibits the use of this income as an offset.

In 1980, the Petitioner had dividend income of $5,392.00; interest income of $10,096.00; net short term capital gains attributable income of $20,938.00; long term capital gains attributable income of $1,468.00 and rental income of $2,654.00. Therefore, the Petitioner's net taxable income of $31,470.00 utilized on Defendant's Exhibit 37 was not derived from employment proceeds and should be subject to the collateral source rule. The same is true for the years of 1981, 1982 and 1983.

The genral rule on interim income is that it will only be deducted if it was derived from a job which could not have been performed simultaneously with the job for which the plaintiff was employed. In other words, earnings from moonlighting are not set off under the collateral source rule. *Brennan v. Goodyear Tire & Rubber Co.*, 11 FEP Cas (BNA) 589 (MD Fla 1975) *affirmed in part and vacated in part on other grounds*, 544 F.2d 730 (5th Cir. 1977).

(6) The rule in the Fifth Circuit is that the collateral source rule is to be utilized in making the plaintiff whole.

In *Peters v. Missouri Pacific Railroad*, 3 FEP Cas (BNA) 792 (ED Texas 1971), *affirmed on other grounds*, 483 F.2d 490 (5th Cir.) *cert. denied*, 414 U.S. 1002 (1973), the court stated that no amounts due to a collateral source could be set off.

In its Conclusions of Law the trial court held:

5. Defendant railroad is not entitled to offset or credit

against the award of back pay any amount received by the plaintiffs from any collateral source.

On appeal, the Fifth Circuit *affirmed* the holding of the trial court, *Peters v. Missouri Pacific Railroad*, 483 F.2d 490 (5th Cir. 1973) and subsequently *modified* the opinion, 6 EPD Par. 8690, June 27, 1973, but the modification did not affect the collateral source rule holding. Ultimately certiorari was denied on the case.

(7) Under the "clean hands" doctrine, equity will not grant relief to a party, who, as actor, seeks to set judicial machinery in motion and obtain equitable relief, if such party in his prior conduct has violated conscience or good faith or other equitable principle. *Franklin v. Franklin*, 365 Mo. 442, 283 S.W.2d 483, 486.

The Respondent comes into this Court with "unclean hands". In fact, the reason for the mental and physical disability of the Petitioner is the discriminatory acts of the Respondent. Therefore, the Respondent should not be able to seek equitable relief by having the temporary disability compensation set off since the Respondent is the cause of the need for the temporary disability compensation. *Walls v. Miss. State Department of Public Welfare*, 542 F. Supp 281 (ND Miss. 1982) at 314: and *Walls v. Miss. State Department of Public Welfare*, 730 F.2d 306 (5th Cir. 1984) at 323-324.

(8) To not apply the collateral source rule to the temporary disability compensation the Petirioner is receiving frustrates the public policy of the ADEA and does not discourage, but encourages, discrimination by the government supervisors and decision makers.

If employers think that they can violate the ADEA and then not have to compensate the victim of the discriminatory act

because they are entitled to offsetting compensation there is little incentive for defendants to see that the ADEA is properly enforced.

The philosophy behind the "make whole" concept and the purposes of statutes such as the ADEA and Title VII, are to eradicate discrimination and to make the victims of discrimination whole. This will not be fostered if the collateral source rule is not applied to the temporary disability compensation payments Petitioner is presently receiving.

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975), the Supreme Court recognized the dual purpose of this type of legislation, Title VII and ADEA, when it stated:

> ...given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.

In addition, in *Albemarle, supra*, this Court also noted the appellate court's role in reviewing back pay awards or denials when it stated:

> The courts of appeal must maintain a consistent and principled application of the back pay provisions, consonant with the twin statutory objectives [eradicating discrimination and making disccriminatees whole] while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases. (Bracketed information added.) *Albemarle Paper Co. v. Moody, supra,* at 2373.

In this regard Petitioner urges the Court to make the Petitioner whole and apply the collateral source rule doctrine to the temporary disability compensation in light of *Peters v. Missouri Pacific Railroad, supra,* and *Albemarle, supra.*

PENSION BENEFITS

It is the Petitioner's contention that since the Petitioner is utilizing the Normal Statistical Date of Retirement, May 19, 1992, as the cut-off for determining damages, the Petitioner is entitled to pension benefits he would have received had he not been the victim of discrimination. The Normal Statistical date of Death is February 1, 2005, and Petitioner would have been entitled to pension and retirement benefits from 1992 until the year 2005. Dr. Floyd Durham in his report (Plaintiff's Exhibit 1) calculates this loss at present value to be $309,584.00.

LOSS OF CONSULTING INCOME

It is Petitioner's contention that under the legal standard of being "made whole" he is entitled to damages for the loss of the income he was making as a consultant because this income was derived separate and apart from his employment. The result of his physical and mental incapabilities from October 21, 1976, until the present, and as projected into the future by the proferred testimony of Dr. William Skinner and Plaintiff's Exhibits 2 through 18, clearly demonstrates he has suffered an economic loss by not being able to perform the functions of a psychologist. Dr. Floyd Durham's report (Plaintiff's Exhibit 1, Pg. 3) determines that the total loss of the Petitioner for his consulting psychologist activities through June 27, 1984, is $61,799.00 and that his loss as consulting psychologist after June 27, 1984, is $56,015.00, (Plaintiff's Exhibit 1, Pg. 42) for a total loss of $117,814.00.

OFFSETTING THE TEMPORARY DISABILITY PAYMENTS

It is Respondent's contention that Petitioner is already receiving compensation for the damage done to him. The Petitioner points out that as a practical, as well as a legal, matter there are serious flaws in the Respondent's position.

First, the use of the temporary disability payments is extremely questionable since the payments are exactly that, temporary.

Secondly, the Office of Workers' Compensation Payments is not a party to this suit, although it is overall a part of the government in the generic sense. If the Court relies on continued payments without some degree of certainty that would not be equitable to the Petitioner.

Thirdly, the reason that the Office of Workers' Compensation Payment is not a party to this action is that the agencies created by the government are separate and distinct agencies. For example, the Workers' Compensation Act was first enacted by Congress on May 30, 1908, and has since been amended; whereas the Civil Service Act, from which stems the United States Civil Service Commission, the original Defendant in this cause of action since it preceded the Office of Personnel Management, was first enacted on January 16, 1883. This fact confuses the issue before the courts because not all of the agencies are before the Court, although the proper Defendant was before the court.

Fourthly, if the Court grants the offset of the temporary disability payments, and does not require that the offset payments be permanent, then the Court is using a partial offset to offset a permanent condition of the Petitioner and the Petitioner is not being "made whole". If this Court affirms the

actions of the trial court and the Fifth Circuit then this Court should, by appropriate remand against the Respondent Order that the temporary disability payments be made permanent because this Court has then treated the payments as being permanent in arriving at the final figure to be paid to the Petitioner for the damages he suffered.

Fifthly, under the present situation of the Petitioner receiving temporary disability payments, if he were to expire, his estate would receive nothing and his wife, who is a collateral victim of the discriminatory actions since the Petitioner is impotent and since she now is in a marriage with a husband who is physically and mentally unable to be employed, would not receive any compensation. On the other hand, if the offsets are not allowed, then the estate, if something were to happen to the Petitioner, would already have the funds and he and his wife would be "made whole" for the discriminatory acts of the Respondent.

WILLFUL ACTIONS AND LIQUIDATED DAMAGES

The trial court refused to consider whether or not the Respondent's actions were willful under the ADEA.

The ADEA does not define "willful violation". However, the term is also associated with the FLSA, upon which the remedial scheme of the ADEA is patterned, in two different contexts, both of which have been judicially interpreted. The term "willful violaiton" is used in a civil context in Sec. 6(a), under which such violation extend Respondent's civil liability for back pay. Sec. 6(a) of the Portal-to-Portal act is incorporated into the ADEA for use in determining the applicable statute of limitations. In view of this fact, the Third Circuit has held, in *Wehr v. Burroughs Corp., supra,* at 998, that the

standard for "willfulness" developed under Sec. 6(a) should be applied in construing the same term as it is used in Sec. 7(b) of the ADEA. Relying on cases construing Sec. 6(a) of the Portal-to-Portal Act, The Third Circuit concluded that:

> Congress did not intend to restrict the meaning of "willful" ...to intentional violations of the ADEA. It is sufficient to prove that the company discharged the employee because of age and that the discharge was voluntary and not accidental, mistaken, or inadvertent. In our view, it would also be sufficient to prove that the discharge was precipitated in reckless disregard of consequences. *Wehr v. Burroughs Corp., supra.*

The Third Circuit also relied on *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1971) and *Brennan v. Heard*, 491 F.2d 1 (5th Cir. 1974).

The Fifth Circuit has provided a definition of "willful" in *Hedrick v. Hercules, Inc.*, 658 F.2d 1088 (5th Cir. 1981) and *Hays v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976). In the definition of "willful" the Petitioner need only show that the Respondent knew or showed reckless disregard as to whether its conduct was prohibited by the ADEA. Simply stated, the Petitioner in this case need only to show that the employer knew the ADEA protected him against the employer's action in denying him the promotion and subjecting him to age discrimination.

In *Hedrick v. Hercules, Inc., supra*, at 1096, the Court stated:

> In establishing a willful violation it need not be shown that the employer knew that his actions were violative of the act or that he acted maliciously or in bad faith, but only that the employer was aware that his actions were

governed by the Act. The record in this case clearly demonstrates that the Appellee knew the consequences of its actions, and the Court was clearly erroneous in not finding that the actions against the Appellant were willful.

Once it has been shown that the action of the employer is willful, the employee is then entitled under the Act to collect liquidated damages, that is, amounts owing as a result of a willful violation. Liquidated damages are designed to be compensation to "the aggrieved party for non-pecuniary losses arising out of a willful violation of the ADEA". *Conference Report on the Age Discrimination in Employment Act Amendments of 1978*, Page 13.

Liquidated damages are specifically authorized by Sec. 7(b) of the Act. Sec. 17 is silent as to liquidated damages; however, it has been held that they are recoverable in the federal employment setting. *Smith v. Lubbers*, 28 FEP Cas (BNA) 324 (DDC 1982); *Muth v. Marsh*, 525 F. Supp. 604 (DDC 1981).

PAIN AND SUFFERING

The trial court did not consider or award damages for pain and suffering the Petitioner endured and is enduring today.

Petitioner argues that the ADEA created a new statutory tort, and the existence of this new statutoty right implies the existence of all necessary and appropriate remedies. District courts which have held that damages for pain and suffering are recoverable and the cases therein are as follows: *Wise v. Olin Mills, Inc.*, 485 F. Supp. 542 (D Colo. 1980); *Flynn v. Morgan Guaranty Trust Co.*, 463 F. Supp 676 (ED NY 1979); *Gifford v. B D Diagnostics*, 458 F. Supp. 462 (ND Ohio 1978); *Kennedy v. Mountain States Tel & Tel Co.*, 449 F. Supp. 1008 (D Colo. 1978); and *Combs v. Griffin Television, Inc.*, 421

F. Supp. 841 (WD Okla. 1976). The court in *Flynn v. Morgan Guaranty Trust Co., supra,* after having read the legislative history of the Act expressed an awareness and concern that the effect of age discrimination are not solely economic. As the *Flynn* decision recognized, a perception of fairness to the employee is the driving motivation for granting damages for pain and suffering. To force an older worker to retire despite continued willingness to and belief in an ability to, work effectiely can inflict a serious blow to one's self-esteem as well as to one's pocketbook. In the case at bar, not only has Petitioner's self-esteem been injured, he has suffered severe pnysical injuries including impotency. Accordingly, damages for pain and suffering are necessary in this type of case to make the victim whole, and that is the ultimate aim of the ADEA.

The appellate court relied upon *Dean v. American Security Insurance,* 559 F.2d 1036 (5th Cir. 1977) in denying punitive damages as well as damages for pain and suffering. However, in *Vasquez v. Eastern Airlines, Inc.* 579 F.2d 107 (1st Cir. 1978), the court decision, although denying pain and suffering damages, questioned the analysis that the *Dean v. American Security Insurance Co., supra,* case was predicated upon, that is that such damages would disrupt and frustrate the administrative conciliation process by discouraging settlement. In *Vasquez v. Eastern Airlines, Inc., supra,* the court reasoned:

> While we appreciate the concern expressed in ... *Rogers* and *Dean* [v. American Sec. Ins. Co. 559 F.2d 1036 (5th Cir. 1977), *cert. den.,* 434 U.S. 1066 (1978)], we are not persuaded that a contrary result might not be logically reached. If an employer realizes that the most it stands to lose in a private suit is lost wages, possibly double for a willful violation, we think it arguable that the employer might be less likely to compromise the claim short of a lawsuit.

In *Wise v. Olin Mills, Inc., supra,* the district court discounted the argument that such damages would frustrate the conciliation process. In *Palvo v. Stiefel Laboratories, Inc.,* 22 FEP Cas (BNA) 489 (SD NY 1979), the district court concluded that the ADEA embodied a tort remedy, much as the Petitioner here has relied

upon, since the "make whole" concept envisions a complete restoration to the ADEA victim.

ATTORNEY'S FEES

The Petitioner does not question the trial court's method of calculating attorney's fees in accordance with the rules of the Fifth Circuit. However, since the court correlated the attorney's fee award to the damage award it is the Petitioner's contention that the attorney's fee award must be revised in light of the trial court's clear error in its calculation of the damages for the Petitioner.

CONCLUSION

For all of these reasons, the Petitioner requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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(214) 565-9500

_____

Frank P. Hernandez
Bar No. 09516000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for a Writ of Certiorari of Royal E. Smith has been forwarded to Mr. Stafford Hutchinson, Assistant United States Attorney, Room 16G28, 1100 Commerce Street, Dallas, Texas 75202, by United States mail, on this the 13 Day of March 1986.

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Frank P. Hernandez

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROYAL E. SMITH, *Plaintiff-Appellant,*	)	
v	)	No. 85-1115
THE OFFICE OF PERSONNEL MANAGEMENT *Defendant-Appellee.*	)	Summary Calendar OPINION

Filed December 13, 1985

Before: Thomas Gibbs Gee, Thomas M. Reavley, and Robert M. Hill, Circuit Judges.

Opinion by Judge Robert M. Hill

Appeals from the United States District Court
for the Northern District of Texas
Barefoot Sanders, District Judge, Presiding

SUMMARY

Employment Discrimination/Civil Service

Appeals from a judgment for the government in a case brought under the Age Discrimination in Employment Act (ADEA). Affirmed.

The appellant is a licensed psychologist who worked for the

U.S. Civil Service Commission from December 1972 until the fall of 1976 as a Personnel research Psychologist. After he was passed over for promotion, he left his job and has been unable to return due to physical and psychiatric problems, but is presently receiving disability retirement compensation calculated at 75% of his former gross pay. Prior to giving notice that he was not returning to his employment due to his condition, he filed a complaint with the Civil Service Commission alleging that he has been discriminated against on the basis of his age. The Commission found discrimination and ordered him made whole in terms of restoration of rank and other benefits which he may have lost, but was unable to return him to work due to medical problems allegedly caused by the discrimination. After exhausting administrative remedies, he filed an age descrimination suit in federal district court, where the government stipulated liability, and the district court awarded him the difference between what he would have earned had he been promoted and what he would have earned at his former position, paid from the date of discrimination until the date the appellant indicated he would not be returning to work. He appealed, contending that he should have received damages for lost pay and future outside consulting income from his part-time practice.

[1] A government employee's damages under ADEA are limited to lost wages, and compensatory damages are therefore not available. **[2]** The United States cannot be sued unless it unequivocally waives sovereign immunity, **[3]** and nothing in the ADEA indicates an intent by Congress to permit the recovery of damages beyond lost wages. **[4]** In *Lyons v. Allendale Mutual Insurance Company*, 484 F.Supp. 1343 (N.D. Ga. 1980), the one case where plaintiffs sought non-pain and suffering compensatory damages under ADEA, the Court held that it was not the purpose of the act to grant general damages. **[5]** Another court applying Title VII to a claim for compensat-

ory damages against the government also held that a federal employee may not recover compensatory damages from the government in a Title VII suit; *Carter v. Marshall*, 457 F.Supp. 38 (D.D.C. 1978).

[6] Appellant's contention that the district court may not offset his recovery by the disability compensation he is receiving fails because the collateral source rule he relies on does not apply when the collateral source is the defendant. **[7]** Damages for pain and suffering are not recoverable against the government under the ADEA.

OPINION

ROBERT M. HILL, Circuit Judge:

We hold today that a federal employee may not recover damages for lost outside income in a case brought against the government under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. We also hold that other complained of errors in this case are without merit. Accordingly, we affirm the judgment entered in this case.

I.

Plaintiff-appellant Royal E. Smith, a licensed psychologist, worked for the United States Civil Service Commission, now the Office of Personnel Management, from December 1972 until the fall of 1976 as a Personnel Research Psychologist. On March 3, 1976, Smith was not selected for promotion to a higher position. On October 21, 1976, Smith left his job and has been unable to return due to physical and psychiatric problems. On March 27, 1978, Smith gave notice that he was not returning to his employment due to the condition of his health.

On December 22, 1976, Smith filed a complaint with the Civil Service Commission alleging that he had been discriminated against on the basis of his age, sex, color, religion, and national origin. The Commission found that he had been discriminated against on the basis of age and ordered that he be made "whole in terms of restoration of rank and other benefits which he may have lost as a result of actions improperly taken against him." The Commission could not reinstate Smith because he was unable to return to work due to medical problems allegedly caused by the discrimination practiced against him. All of Smith's doctors agree that he is presently unable to work and that it is unlikely that he could ever return to his past work. When Smith left work on October 21, 1976, he began using up his accumulated sick leave and vacation time. He has since bought back the sick leave and vacation time he used so as to be able to receive disability benefits from the time he left work. Smith now receives disability retirement compensation for total disability calculated at 75% of his former gross pay; this income is not subject to federal income taxes.

After exhausting his administrative remedies, Smith filed his age discrimination suit in federal court. The government stipulated liability, and the case went to trial on the damages and attorney's fee issues. The district court awarded Smith $1,764.52, the difference between what he would have earned had he been promoted when the government discriminated against him and what he would have earned at his former position. The cutoff date for the district court's damages determination was the date Smith indicated he would not be returning to work. The court did not award any damages for lost future wages because the disability compensation Smith received exceeded the after-tax income he had been earning. The court also awarded $6,481.25 in attorney's fees.

Smith appeals the amount of the damages awarded and the amount of the attorney's fee award. Smith asserts that he should have been awarded back pay, front pay, and pension benefits, all unreduced by the disability he is receiving. He further asserts that he should receive liquidated damages for the government's alleged willful conduct, damages for pain and suffering, and damages for lost past and future outside consulting income. Only Smith's last claim, the one for lost past and future consulting income, merits serious discussion. His other claims will be disposed of after discussing his lost consulting income claim.

II.

Smith conducted a part-time consulting practice from which he earned approximately $5,000 to $10,000 per year. Because he is now totally disabled and unable to conduct his part-time practice, he seeks damages to compensate him for this loss. The district court denied recovery of this loss on the ground that general and compensatory damages are not recoverable under the ADEA. While, as a general statement of law, the district court is correct, Smith's case presents a fact situation not previously encountered in ADEA cases. The vast majoirty of cases that make the statement that general and compensatory damages are not recoverable under the ADEA are cases where the plaintiff sought damages for pain and suffering or mental and emotional anguish. Smith's case differs because he presents a loss for tangible, easily measurable damages rather than intangible damages such as pain and suffering.

[1] Smith's case is sufficiently different from past ADEA cases to require us to fully analyze his case rather than simply affirm based on the holdings in the cases stating that general and compensatory damages are not recoverable. Additionally, we

have not uncovered any discussion at the circuit court level as to whether non-pain-and-suffering compensatory damages may be recovered under the ADEA. We conclude that a government employee's damages are limited to lost wages; therefore, compensatory damages are not available to Smith.

[2] The United States, as a sovereign, may not be sued unless it has waived its sovereign immunity, as it has done under the ADEA. 29 U.S.C. § 633a; *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). A waiver of sovereign immunity must be unequivocally expressed, *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980), and conditions on which the government consents to be sued must be strictly observed and exceptions thereto are not to be implied. *Lehman v. Nakshian*, 453 US.S. 156, 160, 69 L.Ed.2d 548. 553-54 (1981); *Soriano v. United States*, 352 U.S. 270, 276, 77S.Ct.269, 1 L.Ed.2d 306 (1957). The question, then, is to what extent did the United States waive its immunity when it consented to be sued under the ADEA?

The ADEA, enacted in 1967, was amended in 1974 to include federal employees in its coverage. 29 U.S.C. § 633a. It provides in subsection (a) that: "All personnel actions affecting employees or applicants for employment who are at least 40 years of age ... in executive agencies ... shall be made free from any discrimination based on age." Subsection (b) provides for enforcement of the ADEA: "[T]he Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement of hiring of employees with or without back pay, as will effectuate the policies of this section." Subsection (c) further provides: "Any person aggrieved may bring a civil action in any federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter."

While subsection (b) is very specific about one type of relief which may be awarded. subsection (c) is totally nonspecific. Beyond the mention of reinstatement and back pay, the only guidance the statute gives is that the courts may award "such legal or equitable relief as will effectuate the purposes of this chapter." While this phrase, at first glance, appears to authorize a full range of remedies, the phrase must be placed in context. This court, interpreting a similar phrase appearing in the section of the ADEA applicable to non-federal employees, has not read the phrase "grant such legal or equitable relief as may be appropriate" to authorize damages beyond those specifically provided for in the ADEA. *Dean v. American Security Insurance Company*, 559 F.2d 1036 (5th Cir. 1977), *see also, Ginsberg v. Burlington Industries, Inc.*, 500 F.Supp. 696 (S.D.N.Y. 1980).

[3] Additionally, we must start our analysis by applying the constraint that a remedy against the sovereign is not to be implied. *Nakshian*, 453 U.S. at 161. The only specific remedy mentioned by the ADEA is back pay. To allow any recovery beyond back pay, we must find that Congress clearly intended that remedy to be available. Nothing in the ADEA indicates an intent by Congress to permit the recovery of damages beyond lost wages. The ADEA permits a narrow type of recovery in an area where the government has decided to waive its sovereign immunity. Had Congress intended to allow recovery for other damages besides lost wages, Congress easily could have provided for such a recovery. For example, in the portion of the ADEA applicable to non-federal employees, Congress allows recovery of liquidated damages from an employer who "willfully" discriminates on the basis of age. Thus we believe that Congress decided that an award of lost wages would sufficiently compensate the federal employee who suffers age discrimination. By providing for this limited recovery Congress balanced the interests of the injured employee against the in-

terest of the government in limiting damage claims against it. Absent congressional intent to provide for the recovery of damages other than lost wages, we decline to imply such a recovery.

[4] In the one case where the plaintiff sought non-pain-and-suffering compensation damages under the ADEA, the district court denied the compensatory damages sought by the plaintiff. *Lyons v. Allendale Mutual Insurance Company*, 484 F.Supp. 1343 (N.D. Ga. 1980). In *Lyons* the plaintiff asserted that he had to sell his home and secure employment in another state after the defendant discriminatorily fired him. As a consequence. Lyons sought damages for moving expenses, increased commuting expenses, and the increased payments on his new house due to the higher interest rate on the new note. The court denied Lyons' recovery for his consequential damages stating: "The court agrees that the consequential damages Mr. Lyons seeks may not be awarded under the Act. It was not the purpose of the Act to allow recovery of general damages." *Id.* at 1344. We agree with the *Lyons* court that the purpose of the ADEA, at least in those cases involving the federal government, was not to allow recovery of general and consequential damages.

Section 633a was designed to provide federal employees protection from age discrimination in the same way that the portion of Title VII covering federal employees, 42 U.S.C. § 2000e-16, protects federal employees from other forms of discrimination.[1] Since section 633a is patterned after the provisions of Title VII covering federal employees, we may use the case law interpreting Title VII as precedent when construing seciton 633a. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750,

[1]The principal sponsor of the amendment adding federal employees to the ADEA, Senator Lloyd Bentsen, stated that the "measures used to protect federal employees would be substantially smiliar to those incorporated" in the Title VII provisions applicable to federal employees. 118 Cong. Rec. 24397 (1972).

756, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979); *Gillespie v. Helms*, 559 F.Supp. 40, 41 (W.D. Mo. 1983).

[5] The one court applying Title VII to a claim for compensatory damages against the government held that a federal employee may not recover compensatory damages from the government in a Title VII suit. *Carter v. Marshall*, 457 F.Supp. 38, 40 (D.D.C. 1978). Appellant has not cited and we cannot find any cases permitting recovery of compensatory damages from the government in a Title VII case. Since section 633a adopts the enforcement scheme used in Title VII cases brought by federal employees, it follows that compensatory damages are not available in a federal ADEA case. *See also Harris v. United States Department of the Treasury*, 489 F.Supp. 476 (N.D. Ill, 1980) (court dismissed plaintiff's claim for compensatory damages in federal ADEA suit after plaintiff conceded that such damages were unavailable). We therefore hold that Smith may not recover damages for lost past or future consulting income under the ADEA.

III.

[6] In addition to damages for lost consulting income, Smith also sought damages for back pay, front pay, and pension benefits, all unreduced by the disability compensation he is receiving, and damages for pain and suffering, and liquidated damages.

The district court awarded Smith damages for the back pay differential between what he would have earned had he been promoted and what he would have earned had he remained in the government's employment at his present level. This amount was offset by the disability compensation he received during the time period before he indicated he would not be returning to work. The district court did not award Smith damages for lost front (future) pay or for lost pension benefits because the

tax-free disability compensation he is receiving exceeds his past after-tax earnings.[2] Smith argues, however, that the collateral source rule should apply and that his damages are not subject to offset. The collateral source rule provides that a plaintiff's recovery is not to be reduced by benefits received from a third party. *A. H. Bull Steamship Co. v. Ligon*, 285 F.2d 936 (5th Cir. 1960).

We disagree with Smith's contention that the district court may not offset his recovery by the disability compensation he is receiving. The benefit he is receiving is not from a third party but is from the same party whom he is seeking damages from, the United States government. The collateral source rule does not apply when the collateral source is the defendant. *EEOC v. Enterprise Association Steamfitters Local No. 638*, 542 F.2d 579, 591 (2d Cir. 1976); *Olivas v. United States*, 506 F.2d 1158, 1163-64 (9th Cir. 1974).

Additionally, the law is clear that the district court has the

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[2]Because Smith is receiving disability compensation that exceeds any possible front pay award that he might be entitled to receive, we need not decide the question whether a federal ADEA claimant is entitled to receive front pay. This question rarely arises because in most cases a prevailing plaintiff is reinstated and there is no need to award front pay. However, we note that, in a case such as Smith's where the plaintiff is unable as a result of discrimination to earn his livelihood, an award of front pay probably would be necessary to "effectuate the purposes of the Act."

In enacting the ADEA Congress intended to provide a limited remedy for those federal employees injured by age discrimination. In order to accomplish this intent, it would appear that a federal employee who lost his ability to work due to age discrimination would have to be entitled to recover his lost wages. Limited authority exists for the award of front pay in private ADEA cases and in Title VII cases. *See Blim v. Western Electric Co.* 496 F.Supp. 818 (W.D. Okla. 1980) (court allowed recovery of front pay up until the time of retirement in lieu of reinstatement in private ADEA case where plaintiffs were all scheduled to retire within the next year); *EEOC v. Kallir, Phillips, Ross, Incorporated*, 420 F.Supp. 919 (S.D.N.Y. 1976), *aff'd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977) (court awarded one year's pay to plaintiff in private Title VII case who could not be reinstated due to hostility at place of former employment); *Hyland v. Renner Products Co.*, 13 Emp. Prac. Dec. ¶ 11,427 (S.D. Ohio 1976) (court awarded six months pay to plaintiff in private Title VII case); *see alwo Wehr v. Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980); *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979).

discretion to reduce an age discimination plaintiff's award by the sums he has received from other sources, including sums received from third parties. In *Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743 (7th Cir. 1983), the district court deducted unemployment compensation, retirement benefits, and interim earnings from the back pay award. While we realize that *Orzel* did not involve a federal employee, we believe this is the rule that should be applied in cases involving federal ADEA claims. See *also Naton v. Bank of California*, 649 F.2d 691, 699-700 (9th Cir. 1981). We affirm the district court's ruling offsetting Smith's damages by the disability compensation he is receiving.

[7] Smith further contends that he is entitled to recover damages for pain and suffering and liquidated damages. These claims are clearly without merit. All the circuit courts, including our circuit, that have addressed the issue in private sector cases have held that damages for pain and suffering are not recoverable under the ADEA. *See, e.g., Naton v. Bank of California*, 649 F.2d 691 (9th Cir. 1981); *Dean v. American Security Insurance Company*, 559 F.2d 1036 (5th Cir. 1977); *Rogers v. Exxon Research and Engineering Company*, 550 F.2d 834 (3rd Cir. 1977). We believe that Congress certainly did not intend to give this remedy to federal employees in ADEA suits. *Carter v. Marshall*, 457 F.Supp. 38, 42 (D.D.C. 1978). Furthermore, pain and suffering damages are not available in Title VII suits against the government. *Wilson v. Califano*, 473 F.Supp. 1350 (D. Colo. 1979). We therefore hold that damages for pain and suffering are not recoverable in a suit against the government under the ADEA.

Smith's claim for liquidated damages is even more frivolous. *Chambers v. Weinberger, 591 F.Supp 1554 (D.C. Ga. 1984); Wilkes v. United States Postal Service*, 548 F.Supp. 642 (D.C. Ill. 1982). There is no mention of liquidated damages in section

633a, the self-contained section of the ADEA applicable to federal employees. Liquidated damages are permitted only in private sector cases in which the employer's conduct is willful. 29 U.S.C. § 626. Had Congress intended to allow such an extraordinary remedy in a suit against the United States, certainly Congress would have expressly provided for it. We refuse to imply such a remedy in a suit against the sovereign.

IV.

Smith's last complaint is that the district court abused its discretion in its award of attorney's fees. Smith does not dispute the district court's method of calculating attorney's fees but argues that since the district court erred in calculalting the damages and since the attorney's fee award is correlated to the damages, the attorney's fee award must be revised in light of error in the calculation of the damages. Since we find no error in the district court's calculation of damages, there is no need for revision of the attorney's fee award.

The judgment of the district court is AFFIRMED.

APPENDIX B

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROYAL E. SMITH,	)	
Plaintiff-Appellant,	)	*No. CA3-83-179-H*
v	)	
THE OFFICE OF PERSONNEL	)	
MANAGEMENT, formerly	)	
United States Civil	)	
Service Commission	)	
Defendant-Appellee.	)	

December 5, 1984

As I stated, the case was tried before the Court without a jury Monday, November 26th, 1984.

The only issue for the Court's decision is the amount of damages, if any, to be awarded to the Plaintiff. A partial judgment regarding Defendant's liability was rendered June 4, 1983 pursuant to a stipulation. Based upon the pleadings and briefs the evidence adduced and the stipulations of the parties, all of which are of record, the Court makes the following Findings and Conclusions.

FINDINGS

No. 1. The Plaintiff filed his complaint in this court February 1, 1983 alleging Defendant failed to promote him in violation of the Age Discrimination and Employment Act, the ADEA,

29 U.S.C., Section 633(a) et sec. The Plaintiff's claim for injunctive relief was dismissed as he had been on disability retirement since 1978. See Court memorandum, Opinion and Order filed August 31, 1983.

No. 2. On May 31, 1984 the parties filed a stipulation which stated that quote

> "Consistent with the final decision of United States Service Civil Commission (the predecessor agency of the Office of Personnel Managemnt, Defendant) upon Plaintiff's administrative complaint of age discrimination in Federal employment the Defendant hereby consents to the entry of judgment against it on the liability issue" close quote.

The Court accepted the stipulation and entered judgment against Defendant as agreed to by the parties with a partial judgment which I referred to filed June 4, 1983.

No. 3. Defendant's final agency decision specified that quote

> "Age discrimination was a factor in Dr. Smith's nonselection for the position of Chief Technical Assistant Branch, as charged" close quote. See Stipulaiton filed May 31, 1984, Exhibit A at 10. As corrective action the decision prescribed quote "to make Dr. Smith whole in terms of restoration of rank and other benefits which he may have lost as a result of actions improperly taken against him". See the same reference.

No. 4. The November 15th, 1977 report of corrective action required by the decision specified that relief will be provided through priority consideration for the next appropriate available vacancy. See Defendant's Motion to Dismiss filed June 7, 1983, Exhibit 1.

No. 5. The Plaintiff was advised of the corrective action to be taken by letter from the Assistant Executive Director for Regional Operations, Wendell G. Mickle, dated November 15, 1977. See Plaintiff's Response filed July 6th 1983, Exhibit 3.

No. 6. At the time of the final agency decision Plaintiff was receiving compensation for total disability pursuant to the Federal Employees Compensation Act otherwise known as FECA. See the same for reference. As a result priority consideration was to be quote

> "Referred to the first appropriate vacancy after Dr. Smith indicates his availability" close quotes. See the same reference. This was later changed to require consideration for a promotion for which he would be considered were he not absent. See reference Exhibit 15.

No. 7. Plaintiff began working for Defendant on December 31, 1972 as a GS-13, Step 6, Personnel Research Psychologist making $21,862.00 per year. See Defendant's Motion to Dismiss, Exhibit 1. The position to which Plaintiff was denied a promotion because of his age was Chief Technical Assistant Branch, pay grade GS-14. Same reference. As of the date of non-selection for the GS-14 position on March 3, 1976 Plaintiff was a GS-13 Step 7 Staff Psychologist making $27,490.00 per year and was forty-seven years of age. See the same reference. Supplemental factual Stipulation filed November 28, 1984, Exhibit 50. Because of his longevity, that is his term of service in GS-13, if Plaintiff had been promoted he would have been classified as a GS-14 Step 4 and would have been paid $29,546.00. Plaintiff's last official position with Defendant was Personnel Research Psychologist Staffing Division, Dallas, Texas, Regional Office, pay grade GS-13, Defendant's motion to Dismiss, Exhibit 1. Plaintiff's last day at work was October 21, 1976. See Supplemental Factual Stipulation filed

November 28, Page 4, Exhibit 50. Thereafter Plaintiff began an extended absence from which he would not return to work using both sick and annual leave. See Defendant's Motion to Dismiss, Exhibit 1. Effective April 1, 1977, drew disability compensation from the Office of Worker's Compensation, Department of Labor and was on leave without pay from his job. On March 24, 1978 Defendant's Regional Driector Edward Vela, Jr. notified Plaintiff by letter that Plaintiff's leave without pay status would expire April 1, 1978 and that he was expected to report for work on April 3, 1978, quote

> "Unless you indicate to us that you are unable or do not wish to return to duty" close quote.

On march 27, 1978 Plaintiff responded by letter that he would not be returning to work "due to the condition of my health" unquote. On September 12, 1978 Plaintiff wrote to Mr. W. L. Shelton, Jr., Chief Staffing Division to submit his application for disability retirement. On October 3, 1978 Defendant issued his notification of personnel action whereby Plaintiff was granted disability retirement effective September 27, 1978. In January, 1979 Plaintiff bought back the sick and annual leave he had used during the period from October 22 '76 to April 1, 1977 which resulted in retroactive application of Plaintiff's disability compensation. Plaintiff continues up to the present time to draw compensation for disability retirement at the rate of seventy-five percent of GS-13 pay, testimony of Mr. Smith on November 26. His compensation is not subject to Federal income taxes.

The following will be the Court's Conclusions of Law:

Conclusion No. 1. On the day of trial the Court ruled from the bench regarding several categories of damages sought by Plaintiff including liquidated damages, damages for physical and mental pain and suffering and other items of consequential

or general damages. The Court's ruling denied all such damages and the reasons given in support of the ruling as stated in open court are incorporated herein by reference for all purposes. (See App. B. pg. 9b)

Conclusion No. 2. It is further the opinion of the Court that Plaintiff is entitled to lost wages resulting from Defendant's failure to promote him. In determination regarding the extent of lost wages or any other relief to be provided under the ADEA lies within the discretion of the Court. 29 U.S.C. 633(a) subparagraph (c) which gives the Court, I would call it, restricted flexibility in the matter.

Conclusion No. 3. The proper measure of lost wages in this case in the Court's view is the difference in pay between what Plaintiff received in compensation at the GS-13 level, including both his salary while working and any disability compensation and that which Plaintiff would have received had he been promoted on March 8th, 1976, the date on which the position of Technical Director or Technical Assistant Branch Chief GS-14 was filled.

Conclusion No. 4. Defendant's liability for lost wages ended March 27, 1978, the date that Plaintiff indicated unequivocally that he would not be returning to work. This is consistent with Defendant's commitment to consider Plaintiff for a promotion which by necessity terminated upon Plaintiff's decision not to return to work. It follows, based on the Supplemental Stipulation which was filed November 28th, that Plaintiff is entitled to lost wages in the amount of $1,764.52.

Conclusion No. 5. The Court rejects Plaintiff's argument that the collateral source rule precludes consideration of disability compensation to Plaintiff in the Court's determination of lost wages to which Plaintiff is entitled. Indeed the Court questions whether the disability compensation fits the defini-

tion of collateral source and is of the opinion that it does not. The evidence before the Court would not support a finding that this disability compensation is indeed collateral. Collateral benefits as distinguished from direct benefits are those received by Plaintiffs from a source which is in essence independent of Defendant's employer. See *NLRB vs. Gullet Gin Company*, 340 U.S. 361 at 364, a Supreme Court decision of 1951. In any event Plaintiff states quote

> "He is unable to find legal authority to demonstrate that the collateral source rule should be applied under the facts of the instance case to this particular type of judgment" close quotes. See Plaintiff's post-trial brief at 12. Plaintiff cited *Marshall vs. Goodyear Tire and Rubber*, 554 F 2nd 730, Fifth Circuit 1977 for the proposition that collateral benefits are not to be deducted from back pay awards. Now, Marshall is an ADEA case in which the Court refused to deduct unemployment compensation received by the plaintiff upon his back pay award. The Fifth Circuit affirmed that portion of the District Court's decision but in doing so specifically recognized the discretion committed to the Court by the language of the ADEA which grants the District Court jurisdiction to award such relief as may be appropriate. See the decision at 736. The Fifth Circuit recognized established precedent for deferring to the District Court's exercise of discretion in considering collateral benefits. See *Marshall* which also cited to *NLRB vs. Gullet Gin* which I have previously cited to you. In view of such deferences other courts have reduced plaintiff's back pay awards by the amounts received in unemployment compensation and other collateral benefits in age discrimination cases under other facts. See *Davis vs. Griffin Spauling Accounting*, 445 F Supp 1048, Northern District of Georgia, 1976. *Orzel vs. City of Wauwatosa Fire Department*, 697 F 2nd 743, Seventh Circuit, Cert.

denied 104 Supreme Court 484. And see also *Naton vs. Bank of California*, 649 F 2nd 691, Ninth Circuit, 1981.

Conclusion No. 6. Plaintiff's disability compensation here was in lieu of wages ordinarilly paid by his employer. See Federal Employee Compensation Act, 5 U.S.C. 8116, Subparagraph (a) providing that an employee receiving disability compensation may not receive other salary or pay from the United States except as provided. Based on the facts and circumstances applicable in compensation should be and has been considered in determining the extent of back pay necessary to make Plaintiff whole without permitting double recovery in order to effectuate the overall policy and purpose of the ADEA.

A judgment will therefore be entered that Plaintiff is entitled to $1,764.52 in damages for lost back pay plus court costs.

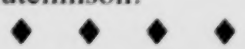
There will remain the matter of award of determination of attorney's fees, if any. As to that I will direct counsel to meet and see if that can be agreed upon. If it cannot be agreed upon then Plaintiff should file his application for attorney's fees by noon, December 12, in affidavit form so far as amount of time and hourly rate is concerned and if there are any legal questions involved with a short supporting brief if there is, for instance, any legal quesiton involved and there may be about Plaintiff's entitlement to attorney's fees before the agency and that I do not rule upon at this time. If counsel cannot agree and Plaintiff then has to file by noon, December 12, his application, the Government's response thereto must be filed by noon, December 19 either questioning the amount of time if that is the Government's course, questioning the hourly rate if that is the Government's course, or whether the Government desires to intervene any legal argument as to what portion of attorney's fees may be awarded. I would anticipate there might be a problem. I hope not. There could be a problem about the agency work and there might be a problem under the *Hensley*

decision as to whether time spent on matters for which an award is not made should be included and that gets to be a matter as counsel are aware how much the Court can separate.

I am going to enter I suppose I will call it a partial judgment at this time with the recovery in the amount that I have stated and reserving for a later day under the deadlines I have stated the decision with respect to attorney fees and that will be the ruling of the Court. Is there any quesiton about it at this time? Mr. Hernandez?

MR. HERNANDEZ: I have none, Judge.

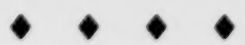
THE COURT: Mr. Hutchinson.



January 16, 1985

THE COURT: The court is in session this afternoon in Civil Action No. CA3-83-179 which is styled Royal Smith Plaintiff vs. Office of Personnel Management, United States Civil Service Commission formerly as the Defendant. This is the third Findings and Conclusions which the Court has issued in this case.

Previously on November 26th at the trial I made certain rulings and thereafter on December the 5th also 1984 additional Findings and Conclusions based on the Monday November 26th proceeding. Before the court today is Plaintiff's Applicaiton for Attorney's Fees which was filed December 12th, 1984 and Defendant's Objections thereto which was filed December 21, 1984 as well as the Defendant's Request for Reconsideration and Amendment of the Court's Findings and Conclusions and that pleading was filed December 24, 1984. The Court notes that counsel for Plaintiff and counsel for Defendant are present.



So judgment is going to be entered by the Court as follows:

The principal amount of $1,764.52 recovered pursuant to the November 26th proceeding.

$6,481.25 reasonable attorney's fees to Mr. Hernandez for the reasons that I have spelled out here today.

$354.00 for his associate.

Expenses of $220.55 and costs pursuant to Rule 68 under which the Plaintiff may recover relevant costs pursuant to Rule 68 and subject I hope to a minimum dispute as to which costs are properly attributable to the recovery in which otherwise.

Judgment will be entered as I say for that amount.

The Defendant's Request for Reconsideration filed December 24th is denied because the Court has looked over once again as requested the Court's previous Findings, has considered everything which the Defendant had raised and is satisfied that the Motion should be denied.

So I will enter a judgment in that amount.

November 26, 1984

I will make at this time the following ruling.

In this Age Discrimination suit as to which liability has been stipulated, the Plaintiff claims that he is entitled to:

One, lost wages;

Two, liquidated damages;

Three, loss of future earnings from his private practice;

Four, loss of retirement benefits;

Five, loss of potential and probable future step increases;

Six, loss for physical and mental pain and suffering;

Seven, loss of supervisory status;

Eight, loss for the disruption of his professional career;

And nine, loss for the premature retirement forced upon Plaintiff by Defendant's actions.

In 1974 Congress expanded the scope of the Age Discrimination Employment Act, cited as the ADEA, to include state, local and federal government employees, 29 U.S.C. 633(a). Section 633(a)(c) of the ADEA provides that quote

> "Any person aggrieved may bring a civil action in any Federal District Court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter" unquote.

The Court notes that this suit has been brought against an agency of the United States Government. The ADEA specifies that the Federal Government quote

> "Shall not be subject to or affected by any provision of this chapter other than the provisions of Section 631 (d) of this title and the provisions of this Section." See 29 U.S.C. 633(a) subparagraph (F).

But the enforcement scheme applicable to private employers which permits the recovery of liquidated damages is not applicable in this case. See 29 U.S.C. 626 (b); *Lehman vs. Nakshian* 453 U.S. 156, 1981.

Further it is well established that the liquidated damages

provision of the ADEA is in essence a penalty imposed upon employers for viollations of the ADEA. See *Wilkes vs. U.S. Postal Service,* 548 F Supp. 642, a Northern District of Illinois 1982 case, the reasoning of which I find persuasive.

It is equally true that punitive damages are not recoverable against the United States. See *Dean vs. American Security Insurance,* 559 F 2nd, 1036 at 1039, a Fifth Circuit case 1977. Cert denied at 434 U.S. 1066.

The Court is therefore of the opinion that liquidated damages are not recoverable against the Defendant in this case and would not so effectuate the purposes quote unquote of the ADEA.

The Court also finds controlling the reasoning of *Dean vs. American Security* which I just cited with respect to damage elements Nos. 3 thru 9 which I have enumerated which the Court views, as general consequential damages. *Dean* precludes the recovery of such damages under the ADEA without distinction between public and private sector cases. See also *Lyons vs. Allendale Mutual,* 484 F Supp. at 1443, a Northern District of Georgia 1980 holding which I take it to be the well-established law of this Circuit that consequential damages may not be awarded under the Act.

In view of that ruling, which as I say, is based upon what is set forth in the instruments I mentioned earlier and a review of the authorities, there remains for disposition it seems to me on damages items solely the matter of lost wages, if any. There is no reason to have any testimony as to any of these other matters.